



Office of the Attorney General
State of Texas

May 8, 1996

DAN MORALES
ATTORNEY GENERAL

Ms. Eugenia A. Cano
City Attorney
216 W. Sealy
Alvin, Texas 77511

OR96-0682

Dear Ms. Cano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID# 39366 and ID# 39953.

The City of Alvin ("Alvin") received two related requests for information. The first is a request for copies of (1) Alvin's proposal to the City of Houston ("Houston") for solid waste disposal services and (2) "a pre-qualification package from Sanifill with their safety record and all violations they have received." The city does not possess documents responsive to the second part of the request.¹ You contend that Alvin's proposal to Houston is excepted from required public disclosure by sections 552.101 and 552.104 of the Government Code.²

The second request that Alvin received is for copies of "any financial records which involve the reopening of the landfill for lawyers, engineering companies, consulting firms, labs, Sanifill and the City of Houston." With the exception of the highlighted portion of one invoice from a law firm, Alvin released the requested financial records to the requestor. You contend that the highlighted portion of one invoice is excepted from required public disclosure by sections 552.101, 552.104, and 552.107(1) of the Government Code.

¹The Open Records Act does not ordinarily require a governmental body to obtain or create new information in order to comply with an open records request. Open Records Decision Nos. 561 (1990), 534 (1989).

²Alvin formed a public/private partnership with Sanifill of Texas, Inc. ("Sanifill") and submitted a joint proposal to Houston. An attorney representing Sanifill submitted a brief to this office and also contends that the proposal is excepted from disclosure by sections 552.101 and 552.104. In support of these contentions, the attorney for Sanifill offers substantially the same arguments for exemption from disclosure as those presented by Alvin.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Chapter 252 of the Local Government Code instructs municipalities on the appropriate procedures to use when purchasing or contracting for goods or services. Section 252.049 of the Local Government Code provides as follows:

(a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

(b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Section 252.049 is optional; if invoked by the municipality soliciting bid proposals, it assures potential bidders that information submitted in proposals will be held confidential by the municipality to which the proposals are submitted. Houston included the following provision in its request for proposals for solid waste disposal services (the "RFP"):

There will be no public opening of Proposals received pursuant to this RFP, and the Proposals will not be available for review until a Partnership Agreement has been entered into or the procurement has been terminated.

Pursuant to section 252.049 and the RFP, Houston is required to maintain Alvin's proposal as confidential until such time as Houston awards a contract or chooses to terminate the bid process without awarding a contract. However, section 252.049 does not confer confidentiality upon a proposal in the maker's possession. Furthermore, section 252.049 and the RFP do not nullify Alvin's power to voluntarily disclose its proposal to the public under the Open Records Act. Thus, we conclude that section 252.049 of the Local Government Code does not make Alvin's proposal confidential in its own hands.³

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." In Open Records Decision No. 593 (1991), this office recognized that a governmental body could be considered a competitor in the marketplace in certain limited circumstances, *i.e.*, only when the governmental body is specifically authorized by constitutional or statutory law to compete with private enterprises. *Id.* at 4. Although Alvin has statutory authorization to enter into

³The invoice at issue is in Alvin's possession and the highlighted portion references a term of its proposal. We note that section 252.049 does not make the invoice confidential.

contracts to furnish or receive solid waste management services, *See* Health & Safety Code §§ 363.116, .117, we have previously ruled that these statutes do not grant Alvin the specific authority to compete for the solid waste disposal contract to be awarded by Houston. Open Records Letter No. 96-0303 (1996). You now make the following arguments with regard to Alvin's authority to compete:

The City of Alvin . . . does not need or rely upon specific statutory authority to act. The City of Alvin is a home-rule city; as such it has full power of self-government and is not required to look to the Legislature for grants of power to act, but only to ascertain if the Legislature has placed any limitations on its power . . . Without Chapter 363 of the Health & Safety Code the City would have and does have authority to contract through its power of self-government. The same is true of the authority to compete.

The home-rule amendment to the Texas Constitution gives cities with more than 5000 inhabitants the option to become home-rule cities by a majority vote of the qualified voters of the city. Tex. Const. art. 11, § 5. The purpose of the home-rule amendment and the enabling act passed by the legislature, V.T.C.S. art. 1175, is to vest in home-rule cities the full power of local self-government and to grant to them the power to do by their charter and ordinances everything the legislature could have specifically granted them the power to do. *Barnett v. City of Plainview*, 848 S.W.2d 334, 338 (Tex. App.--Amarillo 1993, no writ), *Municipal Gas Co. v. City of Sherman*, 89 S.W.2d 436, 438 (Tex. Civ. App.--Dallas 1935), *aff'd*, 127 S.W.2d 193 (Tex. 1939). In *Zachry v. City of San Antonio* the court stated:

[A] Home Rule City is not rendered omnipotent with any and all powers, unless and until those powers are found within the charter of the city. A city possesses powers not denied by statute of constitution so long as the city has incorporated those powers in its charter. . . . Stated negatively, a city's failure to include in its charter a certain power, is a self-denial of the power.

296 S.W.2d 299, 301 (Tex. Civ. App.--San Antonio 1965), *aff'd*, 305 S.W.2d 558 (Tex. 1957). Thus, if Alvin has the authority to compete, such authority must be found within its charter provisions or ordinances. *Id.*; *see also City of Corpus Christi v. Unitarian Church of Corpus Christi*, 436 S.W.2d 923, 927 (Tex. Civ. App.--Corpus Christi 1968, writ ref'd n.r.e.).

You contend generally that Alvin derives its authority to compete from its "broad constitutional power of self-government." Specifically you point to article 1, section 3 of Alvin's charter, entitled "General powers of the city," and summarize the section as follows:

The city shall be a home-rule city, with full power of local self-government . . . as provided by the constitution and laws of this state. It shall have all the powers granted to cities by the constitution

and laws of the State of Texas, together with all the implied powers necessary to carry into execution such granted powers. It . . . may cooperate with . . . any agency or political subdivision . . . to accomplish any lawful purpose for the advancement of the interest, welfare, health, morals, comfort, safety and convenience of the city and its inhabitants

In *Amstater v. Andreas*, 273 S.W.2d 95 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.), the court considered whether a home-rule city had the authority to issue bonds to finance off-street parking facilities in the city's downtown business district. The city had incorporated article 1175, V.T.C.S., in its entirety into section 70 of the city charter, a section dealing with the general powers of the city. The court held that, as section 70 of the city charter in no way referred to the issuance of bonds, but rather dealt only with the general powers of local self-government by home-rule cities, it had no application to the question presented. *Id.* at 98. Likewise, in the situation presented here, we do not believe that the general powers section of Alvin's charter resolves the question of whether Alvin has the authority to compete. As in *Amstater*, the Alvin charter provision that you have cited does not specifically refer to the issue of competition, but rather refers to general powers of local self-government.

To support your contention that Alvin has authority to compete for purposes of section 552.104, you cite to cases⁴ in which the court interprets a *specific* charter provision or ordinance in order to reach a conclusion about whether the specific provision authorizes a home-rule city to take a particular action or whether the specific provision is preempted by or is in conflict with state law. However, you refer us to no charter provision or ordinance that is dispositive of the question of Alvin's authority to compete for purposes of section 552.104. Because you have not shown that Alvin has the authority to compete for purposes of section 552.104, neither Alvin's bid proposal nor the highlighted portion of the invoice is excepted from disclosure under section 552.104.

Finally, you claim that the highlighted portion of the invoice is excepted from disclosure by section 552.107(1). Section 552.107(1) excepts information from disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

⁴*Barrett v. City of Plainview*, 848 S.W.2d 334 (Tex. App.—Amarillo 1993, no writ); *City of Dallas v. Dallas Merchants & Concessionaires Ass'n*, 823 S.W.2d 347 (Tex. App.—Dallas 1991), rev'd, 852 S.W.2d 489 (Tex. 1993); *City of Houston v. Reyes*, 527 S.W.2d 489 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.); *Royal Crest, Inc. v. City of San Antonio*, 520 S.W.2d 858 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); *City of El Paso v. State ex. rel. Town of Ascarate*, 209 S.W.2d 989 (Tex. Civ. App.—El Paso 1947, writ ref'd).

In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. *Id.* at 5. As a client, a governmental body may waive the confidentiality provided by the attorney-client privilege by voluntarily disclosing the privileged material to outside parties. Open Records Decision No. 630 (1994) at 4.

You state that the highlighted portion of the invoice "reveals the City's communication to the private attorneys regarding a financial aspect in the content of the proposal." However, you also state that "[a]s part of the proposal the City of Alvin intends that it remain a confidential communication." The information contained in the highlighted portion of the invoice was in essence incorporated into the proposal that Alvin submitted to Houston. Alvin's submission of the proposal to Houston constitutes a voluntary disclosure of what once was "privileged information" to outside parties. Consequently, Alvin has waived its attorney-client privilege with respect to the information contained in the highlighted portion of the invoice. To summarize, as neither the proposal nor the invoice is excepted from public disclosure by section 552.101, 552.104, or 552.107, Alvin must release this information to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 39366, ID# 39953

Enclosures: Submitted documents

cc: Mr. Lee Fregeau
T & R Ranch
Rt. 1 Box 371
Alvin, Texas 77511
(w/o enclosures)

Mr. Joe B. Allen
Vinson & Elkins
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(w/o enclosures)